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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employee performing stevedoring work on a barge may maintain an action against his employer for injuries resulting from unseaworthy conditions on the vessel where the employer was in the sole and exclusive control of the barge and on factual evidence as to its use, maintenance and operation of the barge was found to have an operational and navigational interest therein and to be the owner *pro hac vice* thereof.

2. Should the petition for certiorari be denied because of the failure of the petitioner to comply with the provisions of Rule 21 of the rules of this court.

RULES INVOLVED

The Rules which the respondent's second question involve are Supreme Court Rules 21 and 22, relevant portions of which are set out in the appendix hereto at page 16.

STATEMENT

The respondent, employed ordinarily by the petitioner as a land based worker in the Shipping Department of its National Tube Works, was, on February 7, 1967, instructed by the petitioner to work as a member of a crew of barge loaders. His accident occurred after darkness on that date. He was working, pursuant to the orders of his superior, inside the barge which was being loaded with pipe manufactured by the petitioner and destined for its customers.

The barge was located adjacent to the dock at the petitioner's plant in the Monongahela River, a navigable waterway. A crane was being employed to lift the various loads of pipe into the barge where the pipe was stacked in tiers. There were unguarded openings between the tiers. On one of the lifts the craneman appeared to lose control of the load and the pipe banged against the wall or side of the dock above the barge. Fearing that the pipe would fall on them the men working in the barge scattered and to avoid injury respondent jumped from the tier of pipe on which he had been located onto the floor of the barge six to eight feet below. There was an extensive accumulation of ice on the surface of the barge at this point which the lack of proper illumination prevented respondent from seeing. Respondent landed on the ice; his feet slid out from under him and he fell and was injured. Respondent maintained that the ice, lack of illumination, absence of guards between the tiers, and a defective condition of the crane caused or contributed to the occurrence and that each of the foregoing conditions rendered the vessel unseaworthy.

Statement.

The district court in admiralty heard the evidence and made extensive findings of fact and conclusions of law. On the basis of the evidence, it found that on February 7, 1967, respondent suffered an accident and an injury caused by the unseaworthy condition of the vessel created by (a) an accumulation of ice in the cargo hold, and (b) the absence of lights upon the barge itself which would have illuminated the whole work area and eliminated the area of darknes in which the icy condition existed (394a).

The possession and control of the barge by the petitioner was proved. Its ownership was not. In fact, petitioner had incorrectly identified the owner in the answers to interrogatories. On the question of use, possession and control, it was shown that the barge was one of the group of five moored at the petitioner's loading area (154a). These had been delivered to the petitioner by a river boat company which, after either tying up the barges or putting them in the control of the petitioner's own barge handlers, left the area (174a, 196a). The barge was then in petitioner's sole possession and control. Barge handlers employed by petitioner thereafter performed all the necessary maintenance and navigational functions with respect to the barges. Petitioner's barge shipper had the responsibility for directing the transportation of the barges from their berths to the loading area at appropriate times. To accomplish this he would contact the supervisor of the barge handler crew whose duty it was to navigate the barges from their location to the point where the pipe could be loaded. The barge handling crew constantly or recurrently performed all of the physical work necessary to transport the barge in the river from the place of original moor-

ing to the point where the crane crew loaded it (346a-348a). According to the defendant, this movement was not done by motor vessels, but by means of pulleys. The means and methods by which such navigation was accomplished was determined solely by petitioner. In addition to the performance of this navigational function, the members of the barge handling crew were responsible for the barges themselves and had pumps with which they would pump out barges found to be leaking (347a). The duties of the barge handlers also obliged them to put out on the barges the warning lights required at night time under the inland rules (21a).

The district court found that the vessel involved was in the sole possession and control of the petitioner and under its direction. It found that by virtue of performing functions of moving the barges within the dock area, pumping the barges when excess water accumulated, and maintaining navigational lights on the barges, the petitioner exercised possession and control exceeding that of a mere bailee, and acquired an operational and navigational interest in the vessel (394a-395a). Since the petitioner was performing navigational and operational as well as stevedoring functions, it was held liable to respondent for unseaworthiness under *Reed v. Yaka,* 373 U.S. 410 (1963).

The Court of Appeals affirmed the judgment of the District Court, *per curiam* noting that the District Court did not err in holding petitioner liable as an owner *pro hac vice* for injuries sustained by a stevedore. A petition for rehearing was denied on July 20, 1971.

Exactly ninety days later (on October 18, 1971) the petitioner filed with the clerk of this Court a single type-

written petition for certiorari. Petitioner filed no proof of service on counsel for respondent. No service of the typed petition had in fact been made on counsel for respondent.

On October 20, 1971, the ninety-second day following the entry of the order refusing a rehearing by the Court of Appeals, petitioner served upon counsel for respondent three printed copies of the petition for certiorari. On the same day it filed its printed petitions with the clerk of the Court* together with proof of service reciting therein that service of the same had been made on counsel for respondent on October 20, 1971. Petitioner did not serve upon counsel for respondent the notice provided for by Rule 21(3).

The service made upon counsel for respondent on October 20, 1971, was the initial and only service upon him of the petition for certiorari.

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*The date of docketing, October 18, 1971, is stamped on the printed copies of the petition. However, counsel for petitioner was informed by counsel for respondent that only the printed petition was filed on that date, an arrangement having been made with the office of the clerk for the filing of the printed petition no later than October 20, 1971.

SUMMARY OF ARGUMENT

This is not a case in which review on certiorari is justified. The issue involved turns upon a factual determination and the correctness of the factual determination made by the District Court and concurred in on review by the Court of Appeals. That finding was to the effect that the petitioner had an operational and navigational interest in the vessel involved, had absolute possession and control thereof, and was the owner *pro hac vice.*

The decision is consistent with the decision of this Court in *Reed v. Yaka,* 373 U.S. 410 (1963) by which an owner *pro hac vice* becomes liable to its employees for injuries caused by the unseaworthiness of a vessel within its possession and control. There is no conflict between the decision of the Court of Appeals in this instance and the decision by the Court of Appeals for the Fifth Circuit in *Watson v. Gulf Stevedore Corp.,* 374 F.2d 946 (5th Cir., 1967) as the petitioner asserts. The last mentioned decision was based upon the finding that the employer had no ownership or operational interest in the vessel, whereas here it was found that the petitioner had navigational and operational interests and was the owner *pro hac vice.* Related cases imposing liability upon non-owner employers under the Jones Act, based upon possession and control, support the correctness of the decision of the Court of Appeals. That decision is in keeping with the broad humanitarian purposes of the seaworthiness doctrine.

There is no federal question presented by this case. It merely involves an application of the doctrine of

Reed v. Yaka, supra, to a factual situation and the decision turns on its own facts. Nothing in *Reed v. Yaka* excludes the application of the rule of that case to vessels used on inland waterways. No new rule of law is presented.

If, in fact, the question presented by the petitioner was of such compelling importance, petitioner would have perfected the filing of its petition for certiorari in the manner required by Rule 21 of the rules of this Court within the ninety days permitted by law for seeking a review. The petitioner did not request the Court in advance to extend the time for compliance with Rule 21 and has furnished no reasons which would justify the Court in its discretion to waive the formal mandatory requirements of Rule 21.

ARGUMENT

I. The Decision Turns on Its Own Facts.

It is apparent that petitioner's quarrel is with the factual determinations of the District Court which were reviewed by the Court of Appeals in the manner required by law. That Court held that on the facts presented the District Court did not err in holding the petitioner liable as owner *pro hac vice*. The District Court expressly found that petitioner had exclusive possession and control of the vessel which exceeded that delegated to a mere bailee, and acquired an operational and navigational interest therein. Petitioner embarks directly upon an attack on those findings and argues in the petition that it did not have such possession and control. Assuming the correctness of the factual findings concurred in by the courts below, petitioner as owner *pro hac vice* was the warrantor of seaworthiness. Should review be granted, this Court would necessarily be required to enter upon an analysis of the facts which two courts have already held support that conclusion. Traditionally, this Court has declined to assume such an obligation. *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, (1949).

II. There Is No Conflict of Decision.

It is well settled that complete possession and control of a vessel renders one owner *pro hac vice* and thus the warrantor of the seaworthiness of the vessel to seamen and longshoremen. So far as third persons are concerned, the vessel and those doing its work are his. Gilmore & Black, *The Law of Admiralty*, Copyright 1957,

pages 215-219. In *Reed v. Yaka,* supra, ownership *pro hac vice* was the incident of a formal bare boat charter which carried with it complete possession and control. In this case the finding of ownership *pro hac vice* rests on factual evidence showing the shifting of possession and control to petitioner to the same degree as in a bare boat charter or demise.

The petitioner complains that there was no evidence of a formal demise or charter. However, proof of formal demise or charter was not essential, there being sufficient factual evidence from which an oral charter could be inferred. If some other formal arrangement existed, the petitioner, who presumably knew of it, did not come forward with any such evidence. As the Court of Appeals held, there was no evidence inconsistent with a demise. Oral charters are common. *Cf. Petition of Shaver Transportation Co.,* 287 F. Supp. 339 (D. Ore., 1967) cited by the District Court; *Banks v. Charles Kurz Co.,* 69 F. Supp. 61, (E.D. Pa., 1946) cited by the Court of Appeals.

While petitioner had sole control and possession of the vessel it exercised, as found by the courts below, a wide range of activities with respect thereto. Petitioner's contention that it had no authority generally with respect to the barges is contradicted by the evidence as found. Thus, petitioner as owner *pro hac vice* stands in the place of the owner for the service contemplated and bore the owner's responsibilities. *Aird v. Weyerhaeuser S.S. Co.,* 169 F.2d 606, 611, (3d Cir., 1948).

Watson v. Gulf Stevedore Corp. 374 F.2d 946 (5th Cir., 1967) is not in conflict. There the employer oc-

cupied solely the position of a shoreside stevedoring company with no ownership or operational interest in the vessel and was consequently not liable for unseaworthiness. Here an operational and navigational interest was found along with exclusive possession and control.

Decisions under related provisions of law support the correctness of the holding of the courts below. On the following facts, in *Mach v. Pennsylvania Railroad Co.*, 317 F.2d 761 (3rd Cir., 1963) a railroad was held liable as an employer under the Jones Act to an employee who was injured while handling a barge brought to the railroad for unloading:

> "Plaintiff was employed as a bargeman at defendant's dock on the Ohio River at Conway, Pennsylvania. At this dock, coal is transferred from river barges to railroad cars. Lacking means of self-propulsion, the loaded barges arrive under tow at a mooring area. There the towing vessel releases its barges, and bargemen, employed by the railroad, take over the handling of the barges. The bargemen first moor them not far from the unloading point. Then, when the time arrives to unload a particular barge, cables, extending from the barge to the dock until it is in position under the unloading crane. After the unloading, the bargemen again use cables to maneuver the empty barge to a mooring place downstream and tie it to other moored barges. In these maneuvers, the bargemen ride the barges and secure or pay out cable as may be required. In addition to maneuvering and securing the barges, the bargemen also place lights on the vessels and pump

> water from them as necessary. In brief, all the handling and attending of barges, from the time a two boat releases its flotilla, through the unloading, until the time when the empty barges are towed away, is done by the bargemen. The bargemen also have duties ashore in connection with the movement of railroad cars to and from the place where the crane loads them with coal from barges." 317 F.2d at pp. 762-763.

Those facts are practically indistinguishable from the evidence developed on the issue here involved. See, also, *Cromwell v. Slaney,* 65 F.2d 940 (1st Cir., 1933) and *The Norland,* 101 F.2d 967 (9th Cir., 1939) involving the Jones Act. In both, the defendant was held liable as owner *pro hac vice* to seamen for injuries resulting from the unseaworthy condition of a vessel. In *Militano v. U.S.,* 156 F.2d 599 (2d Cir., 1946) a general agent of a vessel owned by the United States was found to have such control of the vessel as would subject it to liability under the Jones Act. A non-employee stevedore sued for shipboard injuries. The Court stated:

> "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work . . ." (156 F.2d at p. 602).

Thus it can be said that the decision here involved is consistent with the decisions of this Court and not in conflict with decisions of other courts of appeal in the same matter, and is in accord with related cases involving the maritime law generally.

III. There Is No Important Question of Federal Law.

The petitioner complains of the impact of the decision on the shipping industry generally and especially on the inland waterways. Any rule of law applicable to an industry has impact thereon and the impact on petitioner's local industry stems from the decision in *Reed v. Yaka,* supra, which was decided in 1963. The evidence will not warrant in every case the conclusion that those in petitioner's position are owners *pro hac vice.* That finding depends ultimately on the evidence in each case. Petitioner and those in the position of the petitioner have available to them the means for limiting the possibility of becoming liable to stevedores for unseaworthy conditions of the vessels given into their possession. They need not assume the status of owners *pro hac vice* by undertaking management and control of such vessels. Moreover, they will in most cases have available documents or other evidence showing the terms and conditions of their possession which may rule out a finding of ownership *pro hac vice.* But here, the petitioner assumed to act as owner and, so far as the evidence shows, did not in any way limit its right of possession and control.

IV. Petitioner Did Not Comply With Rule 21.

Only a single typewritten petition was filed within the ninety day period permitted by law for seeking a review. All other acts of the petitioner seeking to perfect the filing of the petition were accomplished after the jurisdictional deadline had expired. It is not disputed that this Court can relax its non-jurisdictional or procedural rules in the exercise of its discretion when the

ends of justice so require. It can be assumed that in a proper case and on the basis of a timely application showing reasonable grounds for granting additional time for compliance, the Court would grant such relief. However, the language of Rule 21 appears to be mandatory. Petitioner did not request any extension of time and has filed no reasons justifying its departure from the rule. Because petitioner delayed action until the very last day, respondent's counsel reluctantly is obliged to assert the procedural defect in the petition. If the petition is not properly filed, certiorari must be denied. It is suggested that no reason appears on the present record which would justify the Court in its discretion to waive the necessary, mandatory and well-known provisions of Rule 21.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EVANS, IVORY & EVANS
PAUL E. MOSES
Attorneys for Respondent

November 17, 1971.

APPENDIX

RULE 21. Review on certiorari -- how sought — parties

* * *

3. Counsel for the petitioner shall file with the clerk of this Court, with proof of service as provided by Rule 33, forty copies of a petition which shall comply in all respects with Rule 23 and shall enter his appearance and pay the docket fee. The case will then be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 33.

* * *

RULE 22. Review on certiorari — time for petitioning

* * *

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23(1), subparagraphs (b) and (f), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35 (2), and 50. Such applications are not favored.